

Conversely, respondent and its insurance carrier contend the preliminary hearing Order should be affirmed.

The only issues on this appeal are:

1. Did claimant injure his back while working for respondent?
2. If so, did claimant provide respondent with timely notice of the accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Respondent manufactures cardboard boxes. And claimant is employed by respondent as a machine operator. Claimant alleges he felt a pop and sharp pain in his low back on July 28, 2006, when he pushed on a conveyor line to prevent boxes from falling onto the floor. According to claimant, the pain almost made him pass out.

Claimant testified that within 15 to 30 minutes of the incident he advised the lead man, Salvador Bernal, he had slowed the machine as he had hurt his back. But Mr. Bernal denies that conversation. Moreover, Mr. Bernal testified that he became aware that claimant's back was hurting on approximately August 15, 2006, when claimant advised he did not want to work a second shift.

Claimant did not initially request medical treatment from respondent. Instead, on August 16, 2006, claimant saw his personal physician. The doctor restricted claimant from working. The next day claimant took the doctor's off-work slip to respondent. On August 17, 2006, claimant signed an application for short-term disability benefits, which indicated claimant could not work due to a non-work-related condition.

This claim hinges on claimant's credibility. The Judge, having personally observed both claimant and Mr. Bernal testify, concluded claimant had failed to prove he injured his back at work and failed to prove he provided respondent with timely notice of the accidental injury.

At this juncture, the evidence fails to establish that it is more probably true than not that claimant provided respondent with timely notice of the alleged accidental injury. Claimant's credibility is somewhat tarnished as he applied for short-term disability benefits by signing an application that he now says he knew contained incorrect information.

Therefore, this Board Member is unable to find that claimant's testimony is more credible than Mr. Bernal's. Accordingly, the preliminary hearing Order denying claimant's request for preliminary hearing benefits should be affirmed.

Based upon the above finding, the issue whether claimant injured his low back at work on July 28, 2006, need not be addressed at this time.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the September 21, 2006, preliminary hearing Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

c: C. Anderson Russell, Attorney for Claimant
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

³ K.S.A. 44-534a.